Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.:

In the Supreme Court of the United States

ERNEST CARL CRANK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Whether a Court of Appeals can deny certification of appealability without giving any consideration to whether a Federal Habeas Corpus Petitioner has demonstrated an *Apprendi* violation respecting drug quantities that was raised *pro se* on direct appeal and misconstrued by the Habeas Court contrary to the explanation of *Apprendi* provided in the *Blakely* decision?

LIST OF ALL PARTIES

The caption contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed. There is no party with an interest to disclose pursuant to Rule 29(6).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Ernest Carl Crank, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered on January 31, 2005.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit denying Petitioner's *Application for Certificate of Appealability* entered on January 31, 2005, is unpublished and can be found in the Appendix attached to this Petition for Certiorari.

JURISDICTION

The January 31st Order, denying Petitioner his Certificate of Appealability [COA] from the an adverse habeas decision, came after a series of filings and rulings which explicated Petitioner's contention that the decision by the District Court contradicted the holding of the United States Supreme Court in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). The District Court's denial of habeas

relief was entered May 12, 2004, a little over a month before this Court's decision in *Blakely v. Washington,* 542 U.S. 124 S. Ct. 2531, 159 L. Ed. 2d 403 (June 24, 2004). Because the case at bar was appealed ten days earlier on June 14, 2004, *Blakely* applies.

By relying on a supposed procedural default or lack of jurisdiction to hear the appealability of the issues, the Court of Appeals would cut off jurisdiction of this court to review rulings which are in conflict with its own clearly established precedents. A court always has jurisdiction to consider its own jurisdiction. See Hohn v. United States, 522 U.S. 236, 252, 139 L. Ed. 2d 1969, 1978, 118 S. Ct.242, 260 (1997); Slack v. McDaniel, 529 U.S. 473, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000) ; Miller-El v. Cockrell, 537 U.S. 322, 154 L. Ed. 2d 931, 123 S. Ct. 1029 (2003)

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V

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STATEMENT OF THE CASE

Earnest Carl Crank brought a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255. Crank was found guilty by a jury of six counts of conspiracy to distribute and distribution of cocaine and cocaine base. His initial sentence of 245 months was partially vacated and remanded by the Court of Appeals for the Eighth Circuit based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court re-sentenced Crank to 240 months on each count to be served concurrently. This sentence was affirmed by the Court of Appeals. **Docket No. 105, p. 1.**

The District Court rejected the Petitioner's *Apprendi* argument by refusing to grant an *habeas* evidentiary hearing on whether the Petitioner was entitled to a jury trial or re-sentencing. The Petitioner maintained that his re-sentencing was in violation of *Apprendi* because his sentence was enhanced from 10 to 20 years based on drug quantities determined by a Sentencing Court by a lesser evidentiary standard. The Petitioner had raised these matters in a Supplemental *Pro Se* Brief filed with the 8th Circuit Court of Appeals on August 17, 2001.

This Petition for Writ of Certiorari is brought because the Petitioner was denied a COA by both the Habeas Court and the Court of Appeals. The Habeas Court granted a COA for 4 of the 6 issues which the Petitioner sought to raise on appeal. **Docket No. 110, Appendix A.** A Panel of the Court of Appeals reversed the grant of a COA and dismissed the appeal without determining the appealability of the *Apprendi* issue. **Docket No. 112,Appendix B.**

A good many of the procedural facts of this case are summarized in an Order entered at the direction of the Court of Appeals by the Clerk, the Honorable Michael E. Gans on January 31, 2004:

> The following events transpired during calendar year 2004. On August 11, this court vacated a certificate of appealability issued by the district court on four of six issues raised by Crank and dismissed his appeal. Instead of filing a timely petition for rehearing and rehearing en bane, Crank moved for an extension until November 24 to file his petition, and the motion was granted on September 27. Again, instead of filing a timely petition, Crank moved for another sixty-day extension. This motion was denied

on December 10, and having dismissed the appeal on August 11, the mandate issued on December 17. On the same day, Crank filed an application for a certificate of appealability on the two issues the district court rejected when it issued the certificate of appealability mentioned above.[1] In considering Crank's application, we necessarily construe it to include a request to recall the mandate, and having carefully considered the sequence of events summarized above, we deny Crank's request to recall the mandate and his application for a certificate of appealability.

It is so ordered.

The Appellant [Petitioner in a Habeas Corpus proceeding below] had requested extensions of time because "the *Petition for Rehearing and Rehearing En Banc* [would] concern an issue

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[1] While it is accurate to say that the Mandate issued on the same day, the 2nd Application for a Certificate of Appealability was actually filed with the Court of Appeals at 10:59 a.m. Appendix F. The Mandate of the Court was transmitted to the District Court at 12:52 p.m. Appendix D. Thus, in a technical sense the Application was filed before the Mandate was issued.

affected by the recent Supreme Court case of *Blakely v. Washington*, 124 S. Ct. 2531 (June 24, 2004)." In his second extension of time counsel for petitioner indicated his belief that "the case at bar [fell] in that category of cases wherein briefs should be withheld until the U. S. Supreme Court decisions in *U.S. v. Booker* and *U.S. v. Fanfan* [were] finally reached." Motion for Extension of Time, 11/24/'04. The Court of Appeals disagreed. Order 12/10/2004.

Shortly after the extension of time was denied, Petitioner filed a second *Application for Certificate of Appealability* (this time directly with the Court of Appeals). Petitioner reminded the Court of Appeals that the District Court had granted the Petitioner's original Application for Certificate of Appealability as to the first 4 of 6 issues requested for certification. The Application also recounted the procedural fact that on August 11, 2004, a panel of this Court issued a decision reversing the District Court's determination that a Certificate of Appealability should be granted with respect to the first four issues, dismissing the appeal and ruling the Motion for Limited Remand was moot. *Application for Certificate of Appealability,* 12/17/2004, p.2.

Petitioner went on in his second *Application for Certificate of Appealability* to delineate the crux of the reason why the Court of Appeals should consider the granting of a COA:

> 11. No circuit court judge has ruled on the Applicant's original certificate of appealability with respect to the 5th and 6th issues:
>
> a. Ineffectiveness of appellate counsel and re-sentencing counsel in failing to raise the *Apprendi* issue on re-sentencing due to a lack of communication with defendant.
>
> b. Cumulative errors creating ineffective assistance of counsel, which should be examined because a majority of Circuits allow for cumulative error.

Application for Certificate of Appealability, 12/17/'04, p.3

A timely Notice of Appeal was filed in this case on June 14, 2004. **Docket No. 107.** The District Court granted a COA with respect to the first four issues but refused to certify on the 5th and 6th issues. Petitioner filed a Motion for Remand on August 3, 2004, requesting that the Court of Appeals remand in order for the lower Court to reconsider its refusal with respect to those issues.

In his Motion for Remand the Petitioner defined the matter as a post-*Apprendi*/pre-*Blakely* case wherein it appeared the Circuit Court during direct review had misapprehended *Apprendi* matters. Petitioner argued that the case was not barred from reconsideration by the District Court. *Motion for Remand*, p.4

Also, in the Motion for Remand Petitioner quoted from Justice Scalia in *Blakely v. Washington*, for the purpose of outlining to the Circuit Court the meaning of statutory maximum punishment, which had been heretofore ambiguously interpreted. "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Motion for Remand*, p.3

Finally, in the Motion for Remand, Petitioner asserted that the Defendant had been correct in his attempts to assert *Apprendi* at Re-sentencing and on Direct Review as well as his continuing presentation of ineffectiveness at every stage directly relating to the type and amount of drugs which under the law as established by the 8th Circuit in this case is an *Apprendi* matter: "Because the indictment did not charge any specific drug quantity and the Jury

did not make any finding as to drug quantity, we vacated all but the cocaine distribution sentence and remanded for resentencing in light of *Apprendi*." *USA v Crank*, 01-1775, page 1 (8th Cir. 10/25/01)

After a COA had been granted by the Habeas Court, a panel of the 8th Circuit Court of Appeals was presented with both the *Motion for Limited Remand* filed by the Petitioner and a *Motion to Vacate the Certificate of Appealability* filed by the Government. On August 11, 2004 the Panel [Loken, Fagg & Beam] ruled that the COA was vacated as improvidently granted. The *Motion for Remand* was denied as moot. And, the appeal was dismissed. Order, 8/11/05.

On August 11, 2004 when the Panel vacated the lower Habeas Court's Certificate of Appealability [COA] it failed to address the appealability of the *Apprendi* issue. Despite the petitioner's *Motion for Remand* and *Appendix Preparation Notice and Designation of Issues, which* articulated the two issues not certified by the District Court, the Panel dismissed the appeal without any ruling upon the appealability of these two issues. This lack of ruling took place despite the fact that the original

Application for Certificate of Appealability, the *Motion for Remand,* and the *Designation of Issues* all explicated the fact that the decisions contradicted holdings of the United States Supreme Court in *Apprendi* v. *New Jersey,* 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

By the time the Clerk entered the Court's order on January 31, 2005, a *Notice of Appeal* had been timely filed; an *Application for Certificate of Appealability*[2] and an *Addendum* to the *COA Application*[3] had been filed with the District Court; A *Motion for Limited Remand* in light of *Blakely* and *Mooney* and as well as an *Appendix Preparation Notice and Designation of Issues* had been

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[2] The *Application* requesting certification for, *inter alia,* review of an *Apprendi* issue was filed 1day before *Blakely* was filed. **Docket No 109**

[3] In the *Addendum,* which was mailed on 7/14/2004, Petitioner raised *Blakely.* Unfortunately, this document arrived after the Habeas Court entered its Order 7/11/2004, *inter alia,* denying the appealability of the *Apprendi* issue. The Order was signed 15 days after the *Blakely* decision. **Docket Nos. 110 & 111.** Certified Copies of the COA Order were not received by the Circuit Court until 7/19/'04.

filed with the Circuit Court[4]; and a second *Application for Certificate of Appealability* was filed with the Circuit Court[5]; all before the mandate had issued. Nevertheless, no ruling has ever been entered by the Circuit Court regarding the appealability of these two issues, which are in conflict with prior rulings of the United States Supreme Court. FRAP 22(b)(2) states that even if no express request for a certificate has been filed, "the notice of appeal constitutes a request addressed to the judges of the court of appeals."

In addition, Petitioner had filed an *Appendix Preparation Notice and Designation of Issues* simultaneously with his *Motion for Remand* Filed at the 8th Circuit Court of Appeals 8/5/2004. As such, the contents of that required filing were also before the

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[4] In the *Motion for Remand* Petitioner detailed that Issue 5 involved a decision in conflict with rulings of this Court (Apprendi/Blakely) and Issue 6 involved a decision where the 8th Circuit was in conflict with a majority of Circuit Courts.

[5] In the second Application for Certificate of Appealability, Petitioner again set out the possibility that both remaining issues were in conflict with the United States Supreme Court rulings.

Court although no reference is made to it in the August 11 Order. In the *Appendix Preparation Notice and Designation of Issues* Appellant indicated his intention in his Appellant's Brief "to argue the latter two issues and contest the District Court's denial of their appealability for the following reasons:

> a. The post-*Apprendi*/pre-*Blakely* issue referred to in paragraph 5.a. above should be considered in light of *Blakely v. Washington* (June 24, 2004); *United States v. Mooney*, No. 02-3388 (8th Cir. 07/21/2004) and any future related decisions in these regards." *Appendix Preparation Notice and Designation of Issues* filed with the 8th Circuit on 8/3/2004, page 2.

The Panel makes no reference in its Order dismissing the Appeal August 11, 2004, to this previous filing which was sent to the Court on August 3rd and received by the Court on August 5th along with the *Motion for Remand.* However, Petitioner-Appellant maintains the *Designation of Issues* put the Court of Appeals on notice that the Petitioner was requesting the Circuit Court Judges to consider granting a COA concerning the *post-Apprendi/pre-*

Blakely issue. Moreover, Petitioner was indicating the present effect which *Blakely* had on the interpretation of *Apprendi.*

REASONS FOR GRANTING THE WRIT

1. The rulings of the 8th Circuit on Direct Appeal and the District Court in denying the Motion for Habeas Relief without hearing are in legal conflict with the ruling of the Supreme Court in *Apprendi {as explicated in Blakely}* and should be reviewed by the Court of Appeals in light of existing precedent.

Unlike *Schirro* v. *Summerlin*, 124 S. Ct. 2519 (06/24/'04) and *Teague v. Lane*, 489 U.S. 288, 313 (1989); the case at bar was on Direct Review at the time of the *Apprendi* decision. In fact Crank's initial sentence was partially vacated and remanded back to District Court by this Court based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Order, Wolle, May 12, 2004; p. 1. **Docket No. 105.**

a. Failure by the Habeas Court to grant an evidentiary hearing was based on a legal error in conflict with the Supreme Court decision in *Apprendi {as explicated in Blakely}*.

The lower Court, in its May 12, 2004 Order, describes its reasoning for denying 2255 relief without hearing based on its erroneous understanding of *Apprendi*:

> Defendant wanted a new determination of drug quantity either through trial or re-sentencing. Essentially, he believed that if Apprendi applied to his case, that is, a jury determination of the drug amount made beyond a reasonable doubt, he would at least receive a different sentence and even possibly be acquitted. Crank asserts he was unable to make his request known to his appellate counsel or resentencing counsel because counsel changed addresses and did not keep defendant informed of this change. Counsel for Crank asserts that where there is ambiguity as to what drugs were actually distributed, the defendant is entitled to a special verdict. Counsel also discounts the government's reliance on Edwards v. United States, 523 U.S. 511 (1998) (district court should determine type and amount of drugs

involved when determining the applicable sentencing range under the guidelines so long as sentence imposed does not exceed that applicable to the offense found by the jury) as it was decided pre-Apprendi.

This argument also fails. The Court of Appeals has relied on Edwards even in post-Apprendi cases. See e.g. United States v. Miller, 295 F.3d 824, 827 (8th Cir. 2002); United States v. Gallardo-Marquez, 253 F.3d 1121, 1124 (8th Cir. 2001). Further as discussed previously, there is no ambiguity as to the drugs that were involved in this case. Through the laboratory reports and witness testimony, it was clear that Crank distributed both crack and powder cocaine. The Court of Appeals found there was sufficient evidence of this in the first appeal, and based on this finding and the new sentence imposed, also held that the new sentence was valid under Apprendi, See United States v. Crank, No. 01-

1775 (8th Cir. October 25, 2001). Thus, even if counsel, at re-sentencing, had requested that the jury make findings on this issue, the motion would have been denied. As there is no prejudice to defendant, there is no valid claim here for ineffective assistance of counsel. **Docket No. 105, page 9.**

What the lower Court fails to note is that Crank filed a *pro se* brief to this Court claiming he was denied his constitutional rights as articulated by *Apprendi* at both trial and sentencing. Supplemental *Pro Se* Brief filed with the 8th Circuit Court of Appeals on August 17, 2001. This denial of rights was not only the right to a jury determination, but to a determination beyond a reasonable doubt. Thus, the errors sounded on a denial of Petitioner's rights under both the Fifth and Sixth Amendments. When the Appeal from the re-sentencing was taken, the 8th Circuit Court of Appeals, like most other Circuit Courts at the time, felt that the maximum penalty meant the 20-year statutory maximum:

Crank argues his new sentence is invalid under *Apprendi.* This Argument fails because his new sentence does not

exceed the statutory maximum term of imprisonment he faced on his offences without regard to drug quantity.

USA v Crank, 01-1775, page 2 (8th Cir. 10/25/'01)

Thus, as a post-*Apprendi*/pre-*Blakely* case wherein it appears the 8th Circuit Court of Appeals misapprehended *Apprendi*, this case should have been considered on habeas appeal in light of *Blakely* because that case was decided while the case at bar was on appeal from the incorrect and adverse habeas decision. In *Blakely v. Washington*, Justice Scalia fully articulates the meaning of statutory maximum punishment, which had been ambiguously interpreted. "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403, 413 (2004).

It is apparent that the Defendant was correct in his attempts to assert *Apprendi* at Resentencing and on Direct Review. He was likewise correct to pursue counsel's ineffectiveness at every stage directly relating to the type and amount of drugs which is an *Apprendi* matter. After all, the Court of Appeals on Direct

Appeal had vacated all but the cocaine-distribution sentence and remanded for resentencing in light of *Apprendi* because the indictment did not charge any specific drug quantity and the Jury did not make any finding as to drug quantity. *USA v Crank*, 01-1775, page 1 (8th Cir. 10/25/'01)

Under *Blakely* it presently appears that the Re-Sentencing Court, the Circuit Court on Direct Review of the Re-Sentencing, the Habeas Court and the Circuit Court failing to grant a COA were all incorrect. See *United States v. Crank* No. 01-1775 (8thCir. 10/25/2001) for an example. The Petitioner, despite the multiple errors of counsel and the courts, was persistently correct about the applicability of *Apprendi.* The validity of his assertions was confirmed by the decision in *Blakely* and is not modified by *Booker/Fanfan*. This Court should grant Certiorari and instruct the 8th Circuit to grant a Certificate of Appealability and to take such actions as will allow for a proper hearing on all the issues associated with *Apprendi* in light of *Blakely* along with the more recent decision of *United States v. Booker & Fanfan*, 125 S. Ct. 738; 160 L. Ed. 2d 621 (January 12, 2005).

b. Denial of a COA by the District Court and failure by the Judges of the Court of Appeals to review that decision consistent with FRAP 22 as modified by the ADEPA denied Petitioner his rights under the 5th & 6th Amendments.

In its May 12, 2004 Order denying habeas relief the lower Court indicates that the Court of Appeals held that the new sentence (which had been reduced from 245 months to 240 months based on an *Apprendi* remand) complied with *Apprendi.* This decision conformed with the widespread mistake that a Judge could enhance a sentence beyond the maximum penalty that could be imposed based on a jury finding without using the reasonable doubt standard so long as the penalty was within the statutory maximum. As a practical matter this interpretation allowed Crank's sentence to be raised from 10 to 20 years in violation of his Fifth and Sixth Amendment rights.

The Petitioner cited *Blakely* on July 15, 2004 to the District Court by Supplement to his Application for Certificate of Appealability to demonstrate the prior errors in construing *Apprendi* [**Docket No. 111**]; in A *Motion for Limited Remand* and again in an *Appendix Preparation Notice and Designation of*

Issues both filed with the 8th Circuit on August 3, 2005. Thus, the second Application for Certificate of Appealability was unnecessary to secure a decision from the Judges of the 8th Circuit Court of Appeals concerning the appealability of the *Apprendi* issue.

In the case at bar, the Court of Appeals has not demonstrated compliance with § 2253(c) with respect to the *Apprendi/Blakely* issue. Recent decisions of the United States Supreme Court make clear the thoughtful type of analysis in which a Circuit Court is required to engage:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.
>
> * * * *
>
> Accordingly, a court of appeals should not decline the application for a COA merely because it

believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. *Miller-El v. Cockerell,* 537 U.S. 322, 336-337, 123 S. Ct. 1029, 1039, 154 L. Ed. 931, 949-950 (2003).

Moreover, there is an overriding concern that (despite the requirement of FRAP 22 as modified by the AEDPA, that judges of the circuit court ultimately ensure a proper ruling on appealability of issues the 8th Circuit Court has failed to rule by saying that Petitioner's latest request for certification is actually a request to recall the mandate. This procedure misconstrues the obligation imposed by the filing of the Notice of Appeal and the required *Appendix Preparation Notice and Designation of Issues.*

Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack, supra*, 529 U.S. at 484. *Miller-El, supra.* At 327, 1034, 944.

The second *Application for Certificate of a Appealability* was not required for the Circuit Court to rule on the *Apprendi* issue. Rather, it was a timely reminder to the Appellate Court of its obligation under FRAP 22. To summarily deny the Petitioner an opportunity to appeal an incorrect *Apprendi* ruling after *Blakely* had been decided on the basis of whether the mandate issued an hour before or an hour after the second *Application for Certificate of a Appealability* was filed is to misapprehend the overall state of the record.

The rationale fails for a number of reasons:

1. The mandate had not yet been transmitted when the second *Application for Certificate of Appealability* arrived at the Circuit Court.

2. This second *Application for Certificate of Appealability* was the 5th filing which put the Circuit Court on notice of its responsibility to determine whether the *Apprendi/Blakely* issue was appealable;

3. The probability that reasonable jurists would find the issue debatable as to whether the Habeas Court's denial of a hearing was in conflict with existing Supreme Court precedent was manifest on the face of the issue as presented to the District and Circuit Courts

See for example, the multiple decisions by the 8th Circuit itself in the cases of *United States v. Mooney*, 401 F.3d 940; 2005 U.S. App. LEXIS 4938 (March 28, 2005) and *United States v. Pirani*, 2004 U.S. App. LEXIS 17012 (8th Cir. Ark., Aug. 16, 2004);

4. No *Application* was required once the Circuit Court became aware of these issues; particularly, in light of the well-known environment for judicial change and disagreement of reasonable jurists as evidenced by the close split of the substantive and remedial majorities in *Booker/Fanfan*;

5. Denial of review based on a questionable procedural technicality in the midst of widespread juridical

uncertainty violated the Appellant's right to due process and ultimately to the reasonable doubt standard as guaranteed by the Fifth Amendment;

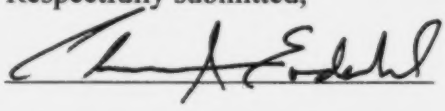
6. Denial of review based on a questionable procedural technicality in the midst of widespread juridical uncertainty violated the Appellant's right to effective representation of counsel and ultimately to the right of trial by jury as guaranteed by the 6th Amendment. In Accord. *Slack*, supra. at 484, 1603, 555.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for Writ of Certiorari should be granted.

Dated May 2, 2005

Respectfully submitted,



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ATTORNEY FOR PETITIONER

PROOF OF SERVICE

I hereby certify that on this 2nd day of May, 2005, I, the undersigned person, served three copies of the Petition in this cause by mailing the same to the following counsel for Respondent:

Solicitor General of the U.S. Department of Justice

10th Street & Constitution Avenue NW

Washington, DC 20530

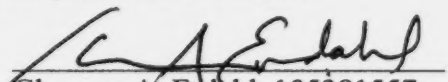
Cliff Cronk

United States Attorney's Office

1830 2nd Ave.

Rock Island, IL 61201

in full compliance with the provision of Rule 29.



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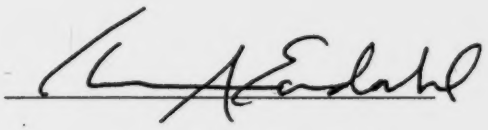
ATTORNEY FOR PETITIONER

CERTIFICATE OF FILING

I, Clemens A. Erdahl, attorney for the Petitioner, hereby certify that I filed forty copies of the Petition with the Clerk of the Supreme Court of the United States by mailing the same by regular mail to 1 First Street NE, Washington DC 20543 on the 2nd day of May, 2005.



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